

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN WALES**  
**PROPERTY, TRUSTS AND PROBATE LIST (ChD)**

The Law Courts,  
Bodhyfryd,  
Wrexham, LL12 7BP

Date: 21 July 2021

**Before:**

**HIS HONOUR JUDGE KEYSER QC**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between:**

(1) PHILIP JOHN BARRE	
(2) TRACY ANNE BARRE	<b><u>Claimants</u></b>
- and -	
(1) PETER JOHN MARTIN	
(2) SUSAN MARY MARTIN	
(3) JONATHAN PETER MARTIN	
(4) JAMES DAVID MARTIN	<b><u>Defendants</u></b>

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**Gwydion Hughes** (instructed by **Irwin Mitchell LLP**) for the **Claimants**  
**David Hoffman** (instructed under **Direct Access**) for the **Defendants**

Hearing dates: 29, 30 June, 1 July 2021

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2 p.m. on Wednesday 21 July 2021.

## **JUDGE KEYSER QC:**

### **Introduction**

1. The claimants, Mr and Mrs Barre, are the owners and occupiers of the freehold land and premises at and known as The Gro, Llansantffraid, Powys (“The Gro”). Their title is registered at HM Land Registry under title number WA644012. The Gro is a Georgian property situated in about 3 acres of land. Within the grounds are also barns, which the claimants have converted into holiday accommodation for up to 12 people. The claimants have lived at The Gro since January 1998 or perhaps (as Mrs Barre said in her oral evidence) January 1997, initially as tenants, and they purchased it in March 1999.
2. The Gro is situated about 400 yards from the public highway, the A495. Access from the highway to The Gro is along a route that for much of that distance runs over freehold land at Bryn Tanat Hall, Llansantffraid (“Bryn Tanat”). Bryn Tanat is a large country house, now occupied as a hotel, in 15 acres of grounds, which also now contain holiday lodges. It is owned by the first and second defendants, Mr Peter Martin and Mrs Susan Martin (“Mr and Mrs Martin”), and their sons, the third and fourth defendants, Mr Jonathan Martin and Mr James Martin, who all carry on business in partnership at the hotel. Their title is registered under various title numbers; for present purposes the most important is WA614153, which relates to a piece of land (sometimes called “the Dolwen Land”) that was purchased and added to Bryn Tanat as recently as October 1991.
3. The claimants allege that since 2007, when they opposed, and led local opposition to, the defendants’ application for planning permission to develop land at Bryn Tanat, the defendants have engaged in a persistent and systematic course of conduct that has been intended to and does substantially interfere with the exercise of their right of way over land at Bryn Tanat. They seek an injunction and damages. The defendants deny that they have committed any substantial interference with the exercise of the right of way and contend that the claimants’ case rests on a misconstruction of the Deed of Release and amounts to an attempt to gain rights over a larger area of land than is referred to in it.
4. I am grateful to Mr Gwydion Hughes and to Mr David Hoffman, counsel respectively for the claimants and the defendants, for their helpful submissions.
5. I attended a site visit on 29 June 2021 in the company of the claimants, the first and second defendants and Mr Hoffman. This was of assistance to me in gaining an understanding of the dispute.
6. The trial bundle was of less assistance, because it did not include the documents and the photographs in a consistently chronological order, because it contained duplicate copies of most of the relevant documents, and because it was not prepared in accordance with the *Chancery Guide*.

## Narrative

7. Bryn Tanat (save for the Dolwen Land) was purchased by Mrs Martin's parents in 1967. At that time and for many years previously, Bryn Tanat and The Gro shared a common vehicular access from the A495 along what was, more or less, a straight roadway, directly to the west of the house at Bryn Tanat. At this time The Gro was owned by the Beauclerk family. The roadway served as access not only to The Gro but to other land owned by the Beauclerk family.
8. In 1989 Mrs Martin's father died. Shortly afterwards Mr and Mrs Martin and their children went to live at Bryn Tanat with Mrs Martin's widowed mother.
9. Mr and Mrs Martin felt that it would be better if the access were moved westwards, away from the house. The main reason for this may have been that the accessway in its existing position gave their young children easy access to the busy road, whereas an access point some distance from the house would not do so. In the latter part of 1991 Mr Martin discussed the relocation of the access with the land agent acting for the Beauclerks, and agreement was reached in principle for the relocation.
10. To this end, in October 1991 Mr Martin's company, B. Martin and Son (Trefonen) Ltd ("the Company"), purchased the Dolwen Land, which was a piece of farmland abutting the A495 to the west of Bryn Tanat. In January 1992 Mr Martin applied for planning permission for the relocation of the accessway by creating a new access on the Dolwen Land. The agent acting for Mr Martin was Mr C.E. Williams, a chartered surveyor; it was he who drew the plan dated January 1992, which formed part of the application and showed the new access. Planning permission was granted in March 1992. The grant was subject to conditions, among them that the new access "be located 80 metres west of the existing access serving Bryn Tanat" (an ambiguous description that led to problems in due course) and that "[t]he existing means of vehicular access serving Bryn Tanat and The Gro shall be closed up in permanent materials within 2 months of the new access being brought into use."
11. According to Mr Martin, the new access was constructed immediately after the grant of planning permission had been made. The construction involved the removal of a section of the hedge that ran alongside the A495, so as to create the new access point and splay. This splay was funnel-shaped between points marked out on the ground by officers of the Highway Authority. From the entrance point the new access lay across what had been a field in Dolwen Farm. Mr Martin marked out the route of the access way across the field. His evidence was that he did not have the use of a plan for this purpose. After the route had been marked out, the top layer of soil was removed; and, as the field had been at a lower level than the highway, the level was built up with building rubble. The track was then surfaced with cinders and compacted stone, as the previous access had been. The track was then separated from the land to either side: on the east and north (the left as one enters) a curving stone wall was constructed from the boundary hedge to the entrance to Bryn Tanat; on the west and south, a stock-proof fence was erected. Mr Martin's evidence was that most of the wall was constructed by July 1992 but that it was not completed until some time later, though it had been completed by the time the claimants moved to The Gro.

12. By a transfer dated 9 July 1992 the Beauclerk family transferred The Gro to Mr Ian Hall, who is Mrs Martin's brother. By this time, according to Mr Martin, the new access was already in use and the old access had been stopped up.
13. In 1992 Mr and Mrs Martin purchased Bryn Tanat from Mrs Martin's mother.
14. Correspondence between the Martins' solicitors and the Beauclerks' solicitors took place in August 1992 and agreement to the relocation of the access was confirmed almost immediately (Mr Martin of course says that it had been agreed in principle previously). By that time, Mr C.E. Williams had produced a new plan, to a scale of 1:500. That plan was later used in the relevant deeds and it appears to have been the plan used in the negotiations with the Beauclerks. Mr Martin's evidence was that the new access had been constructed by the time the new plan was drawn.
15. In the event, the formal variation of the rights of way was dealt with separately as between the Company and Mr Hall on the one hand and the Company and the Beauclerks on the other. A draft deed was provided to the Beauclerks in September 1992 but an issue arose concerning contributions to the cost of upkeep of the new access (I refer to this further below), and for that and other reasons there was a delay in formally concluding the matter with the Beauclerks.
16. The relocation of the access to The Gro was formally effected by a Deed of Release dated 1 December 1993 between the Company as owner of Bryn Tanat and Ian Hall ("the Grantee") as owner of The Gro. Bryn Tanat was referred to as "the Servient Land" and The Gro as "the Dominant Land". By clause 3 the Grantee released and surrendered the existing right of way over "the Old Roadway", which was shown coloured brown on Plan 2 attached to the deed. The further provisions of the deed were as follows:
  - “4. In consideration of the above releases the Company as beneficial owner of the Servient Land GRANTS to the Grantee his successors in title the owners and occupiers for the time being of the Dominant Land and persons authorised by the Grantee or any of them to pass and repass at all times by day or night on foot and with or without animals and motor vehicles to and from the Dominant Land from or to the public highway over and along the New Roadway for all purposes connected with the use and enjoyment of the Dominant Land.
  5. The Company hereby covenants with the Grantee to maintain the New Roadway in good repair and condition and to keep it clear and unobstructed at all times SUBJECT TO the Grantee's obligation to pay a fair and reasonable proportion of all payments costs and expenses incurred by or on behalf of the Company in relation to such maintenance and upkeep.
  6. The Grantee hereby covenants with the Company to pay to the Company or its successors in title a sum equal to a fair and reasonable proportion according to user of all payments costs and expenses incurred by or on behalf of the Company in

maintaining the New Roadway in accordance with clause 5 a roadway suitable for agricultural use only.”

17. Plan 2 showed the New Roadway coloured in yellow. Plan 2 was the plan dated July 1992 and drawn by C. E. Williams. In order to avoid confusion resulting from terminological differences between the parties, I shall for the time being refer to the New Roadway simply as “the Way”. The Way enters off the highway some distance to the west of the former access. It proceeds south (i.e. perpendicular to the highway) for a short distance, before curving through 90 degrees and continuing eastwards directly towards the entrance to Bryn Tanat. It then curves southwards and continues towards The Gro. The Way itself terminates, at a point adjacent to and to the west of the Old Roadway, more or less immediately before the access to The Gro bends sharply to the south west (that is, to the right). From that point the access is over land still owned by the Beauclerks. This part of the access, which is not in issue in these proceedings, goes downhill between hedges on either side. The current width of the track between hedges is about 8 feet, though if the hedges were cut back it would more likely be at least 10 feet.
18. The claimants moved into The Gro in January 1997 or 1998, several years after the Way was constructed and the permitted route of access was changed.
19. According to Mrs Barre, in 1998 the Way was in a good state of repair, surfaced with Criggon stone, with no potholes. “For the majority of the roadway, two vehicles could pass each other”. “There were wooden post and rail fences all the way down the western side of the field where horses were grazing. On the eastern side of the roadway there were random stone walls set back from the roadway with grass verges sufficient to pull a car onto should the need arise.” I accept this evidence.
20. In 2000 the claimants applied for planning permission to convert two redundant barns at The Gro to living accommodation and use them for holiday lets. Mr and Mrs Martin objected to the application, but it was granted. Use of the holiday accommodation required the use of the Way for access.
21. In 2001 the Company sold the Dolwen Land to Mr and Mrs Martin, and the following year the Company went into administration, though it was some years before it was struck off the register.
22. In 2002 the third and fourth defendants began to operate a commercial business from buildings at Bryn Tanat. Mrs Barre’s evidence was that the large vehicles that made deliveries to the site began to cause potholes in the surface of the Way and that she and her husband started to become concerned about the state of the road. Nevertheless, her witness statement confirms that until December 2007 the roadway was kept in good condition, and I find that until then any deterioration of the condition of the Way was not particularly significant. Mr Martin confirmed, and I accept, that no complaints about the condition of the Way were received during this period. Two facts are worth noting, however. First, at this time the Way was in use by the owners of Bryn Tanat as well as those of The Gro. Second, as Mrs Barre said and I accept, the claimants were at this time assisting in the maintenance of the Way by scraping it with a JCB and putting stone chippings down, as they considered necessary, without objection from or hindrance by the defendants. Both of these facts were to change after 2007.

23. Between 2003 and 2007 the defendants obtained planning permissions for subdivision of the house at Bryn Tanat and ancillary buildings into separate dwellings. The claimants did not object to the applications for these permissions. Relations between the parties remained good.
24. In 2007 the defendants applied for planning permission for a chalet/caravan park on land within the curtilage of Bryn Tanat. In the event, the defendants withdrew the application, in part because of concerns regarding access. In the course of consideration of the application, the local planning authority had ascertained that the new access purportedly constructed pursuant to the planning permission granted in 1992 had not been constructed in accordance with the grant because, among other things, the entrance from the A495 was in the wrong place: the access from the A495 had been made 80 metres to the west of the former joint access already mentioned, whereas it ought to have been made 80 metres to the west of an access to the east of Bryn Tanat that served Bryn Tanat alone. The local planning authority also concluded that the use of Bryn Tanat as a hotel was unauthorised and that the defendants had constructed a tennis court on land adjacent to the south-west end of the Way without necessary planning permission.
25. The claimants had objected to the application for planning permission for a chalet/caravan park at Bryn Tanat. That objection—whether the fact or the manner of the opposition is immaterial for present purposes—led, as I find, to what has been the breakdown of the parties’ relationship. There is now a great deal of animosity. It is clear, in my view, that since that time the defendants—in particular, Mr Martin—have deliberately followed a course of conduct designed to make the use of the Way unattractive for the claimants. However, it is a different question whether they have done so by interfering with the exercise of the right of way or merely by strictly confining the claimants to such user as they are entitled to in accordance with the Deed of Release.
26. On 3 December 2007 Mr and Mrs Martin wrote to the claimants, informing them that because of recent thefts and consequent security concerns they were going to install security gates at the end of the Way, which were to be locked and have a security code that would be provided to the claimants. The claimants replied on 5 December, expressing concern and requesting that, before any physical barrier were erected, Mr and Mrs Martin provide further information in accordance with sixteen numbered questions relating to such matters as the nature, operation and cost of the proposed security gates. Mr Martin replied on 8 December:

“I hope that the extract from a web site answers all of your questions. The web site named is on the attached extract.

If the access gates are locked I have a duty to provide you with the means of unlocking them. If the gates are locked it will be your responsibility to ensure that the gates are relocked. This will include when you or any person you give the means of access to have passed through them.

I hope that I have made matters clear for you.”

27. In his evidence at trial, Mr Martin said that the website to which he referred the claimants related to general boundary matters, not to anything specific to his proposals. I am satisfied that his response did not and was not intended to constitute any engagement with or response to the claimants' questions. I am also satisfied that Mr Martin's pretext for wanting to install a locked gate across the entrance to the Way, namely security concerns, was false. The real reason is apparent from Mr and Mrs Martin's letter dated 21 December 2007 to the planning officer:

"We apologise for constructing the unauthorised access ... The access we intend to construct will therefore replace the unauthorised access to Bryn Tanat Hall Hotel. The unauthorised access will be gated with locked gates. The property known as the Gro and the Gro land has a lawful right of way (which we granted) over the unauthorised access but we will use our best endeavours to renegotiate the agreement transferring the right of way to the new access. In practice we feel that the Gro and the Gro land will find it more convenient to use the simple new access than negotiate a gated access and so in due course we would be looking to close permanently the unauthorised access."

The importance of closure of the Way was highlighted by the response of the planning officer by email on 15 January 2008:

"Clearly, the legal right of access is potentially a major stumbling block, as the Highway Authority would not accept a separate access to The Gro and a separate access to Bryn Tanat; and the situation may arise where a planning proposal cannot be implemented until/unless the legal right of access has been successfully renegotiated."

28. In late December 2007 Mr Martin installed the gate, which was attached to gateposts. The width of the gate was 4.8m (16 feet). A photograph from 2009 shows the gate (open) and its fixtures. The gate was not self-closing and it was never locked.
29. The Barres did not raise a complaint about restricted access resulting from the gate or about the installation of the gate.
30. In August 2008 the local planning authority issued an enforcement notice in respect of what it said was unlawful change of use of Bryn Tanat from a private residence to a hotel. The defendants appealed against the enforcement notice.
31. In October 2008 the defendants applied for planning permission for a new access for Bryn Tanat; this was in reality in support of the appeal against the enforcement notice, in order address the Highway Authority's concern that the egress from the Way onto the A495 had insufficient visibility to the west. The difficulty faced by the application for permission for a new access was that the creation of a new access in proximity to the existing access would be detrimental to highway safety, unless the existing access were to be closed up. The application was supported by a Design and Access Statement by Mr A.F. Macdonald, a civil engineer, which contained the following passages:

“1.2 ... The owners of The Gro and the adjacent lands, however, have legal rights of way over that existing access [that is, the Way]. Unless and until they agree to change that right, the access cannot be stopped up.”

“1.9 As set out above, there is a legal right of way over the existing access and the applicant cannot force the owner of that right to accept a different route. He can, however, provide the new access which is obviously more convenient and commodious than the existing access. Further, self-closing gates can be put across the existing access, thus making its use difficult. Whilst those with the legal right to use the access may insist on doing so, whilst they believe they have a power to require compensation/ransom payment in order to accept the better access, once the consent is granted, it is considered very unlikely that they will continue to use that access. ... Whilst no guarantees can be given the of The Gro [sic] will agree to rescind that right of way, it is believed very likely that he will do so.”

“1.16 Whilst the Highway Authority may not wish to see the existing access remain, the provision of two self closing (sic) gates across that access should be a sufficient deterrent to ensure that the owners of both The Gro and the adjacent land use the new access as to do otherwise would cause them great inconvenience.”

32. That statement was withdrawn in mid-October 2008 and replaced with a revision that did not contain the passages I have set out. Mr Martin’s evidence was that he had not seen the statement before it was filed and that those passages did not represent his instructions but were an unauthorised expression of a tactic thought up by Mr Macdonald. I reject that evidence, which I consider to be obviously incredible. By the time the statement was withdrawn and replaced by a revision, the claimants had seen the first version and referred to its terms in their objection to the application.
33. By a letter dated December 2007 but in fact sent in early November 2008 the defendants made to the claimants an offer of a new access:

“We have recently submitted a planning application for an improved access to Bryn Tanat Hall ... The access onto the A495 will be at the approximate point permitted under planning permission M21853 [that is, the 1992 permission] and about 30m to the west of our existing access.

The access needs to be re-located for the safety of road users on the A495 ...

In providing you with a safer access your existing easement rights will not be affected in any way. If after careful consideration you only wish to use the correctly constructed and safer access we will grant you the same easement rights as



you currently enjoy and pay any reasonable legal expenses to amend the legal documents.”

34. In December 2008 the application for planning permission was refused. The defendants appealed, and the appeal was conjoined with the appeal against the enforcement notice.
35. In January 2009 the local planning authority issued a Certificate of Lawfulness in respect of the use of the Way on account of the length of time since its construction.
36. In March 2009 the defendants’ appeal was adjourned to permit them to make a new application for permission for change of use of Bryn Tanat from a dwelling to a hotel and the construction of a new access between the Way to the west and the house at Bryn Tanat to the east. That application was made in May 2009. The claimants objected to the application. However, the Highways Authority was satisfied with the proposals for access, and on 24 July 2009 planning permission was granted for the new access onto the A495 and, retrospectively, for the change of use of Bryn Tanat from a dwelling to a hotel.
37. Work on the new access was commenced promptly. In 2009 and 2010, in the course of that work, the curved stone wall along the east and north side of the Way from the entry from the A495 to the entrance to Bryn Tanat was removed and replaced by a fence up to the intersection with the new access. The stone was reused in the building of a new wall adjacent and parallel to the A495; the hedge that had been there was removed. I believe that it was at about that time that a bin store was placed on the west of the new access, at a point adjacent to the north side of the Way, just before the Way bends to the south.
38. I find that the claimants did not complain about any impact of these works on their use of the Way, though they did complain that the Way was not in a proper state of repair.
39. According to Mrs Barre, whose evidence on the point I accept, in 2009 the defendants began to place boulders “at the side of the roadway”. I find that the boulders were not actually placed on the stone track itself; rather they were on the grass verges on either side, immediately adjacent to the track. The effect of the boulders was to confine vehicles to the track itself and prevent use of the verges for passing.
40. Nevertheless, Mrs Barre’s evidence was that during 2010, when the claimants were completing work on their holiday lets, they were able to get a large ridged wagon, 16.5 metres (54 feet) long and 2.55 metres (8 feet 4 inches) wide, along the Way to The Gro to deliver two shipping containers, which the same vehicle collected in April 2011. I accept that evidence. Mrs Barre complains that the same vehicle would not be able to pass along the Way now.
41. By a letter dated 2 June 2010, solicitors acting for Mr Martin wrote to solicitors acting for the claimants. The letter said that the right of way over the Way did not extend to user in connection with holiday dwellings built within the curtilage of The Gro since the Deed of Release. The letter also addressed issues of maintenance and repair:

“Clause 5 of the easement imposes an obligation to maintain the access road in ‘good repair and condition’. This is a positive obligation imposed on B. Martin and Son (Trefonen) Ltd not upon my client. The Company is no longer in existence so of course it is no longer possible for the owner of the Gro to enforce that covenant as the chain of indemnity has been broken.

My client considers that in any event the access is maintained to a standard suitable for agricultural purposes.”

The letter referred to the new access that had been constructed by the defendants and reiterated an offer, previously made in April 2010, to grant a new easement in respect of the new access in return for a payment of £15,000, on condition of surrender of the existing right of way over the Way and “an apportionment of the cost of future upgrading and maintaining of the access according to user.”

42. There was some negotiation concerning that offer. In July 2010 Mr and Mrs Martin’s solicitor sent a draft deed of easement substantially in accordance with the terms of the offer. In August 2010, understanding that the terms of the deed had been agreed, they sent a final draft. The claimants’ solicitor made no further substantive response, and on November 2010 Mr and Mrs Martin’s solicitor wrote directly to the claimants, asking if the deed were acceptable. This elicited a response from the claimants’ solicitor, who on 3 November 2010 wrote intimating the claimants’ intention to carry out maintenance works on the Way. On 17 November 2010 Mr and Mrs Martin’s solicitor replied as follows:

“We deny that your client is in any way permitted to use the land other than to pass and repass over it.

We are in the process of taking our clients['] further instructions. In the mean time [sic] please provide us with the following documentation in order to address our clients['] concerns regarding health & safety:

- Mr Barre’s license/certificate [sic] to operate JCBs
- The JCB registration and insurance documentation.

In relation to the proposed works, please provide us with the following:

- The full detail and scope of the works that Mr Barre wishes to perform along with appropriate plans
- The name of the contractor and details of the contract when it is awarded
- Copies and details of Insurance Certificates for Public Liability for £5,000,000 (Five million pounds) from the successful contractor

- Risk Assessments for the scope of the works.

Please note that until this matter is finalised, if any works are carried out, without permission of our client, we will immediately apply for an injunction and will seek recovery of costs from your client.”

43. I am not aware of any reply to that letter. I infer that the claimants did not attempt to carry out maintenance of the Way.
44. At about the end of 2010 the defendants planted a hedge, with a low picket fence in front of it, on either side of the access splay. It is probable that this work reduced to some extent the width of the splay, but I am unable to identify the precise extent of the reduction.
45. The claimants have produced a letter dated 9 March 2012, addressed to Mr and Mrs Martin, stating that the Way had not been maintained and was “becoming almost impassable” and was causing damage to their car. The letter said that the claimants were going to carry out maintenance works and asked: “Please do not harass or assault us in carrying out our legal right but seek advice through the appropriate channels.” It concluded: “You are welcome to see all insurance documents and our health and safety file that is kept securely in our office. Please book to make an appointment to view them.”
46. Mr Martin’s evidence was that he had no recollection of seeing that letter. The probability is that it was sent and, therefore, that it was received. At all events, on 10 March 2012 Mr Barre attempted to carry out maintenance in his JCB machine and was prevented by Mr Martin on grounds of concern for the safety of guests at the hotel. Several pages of the police log show what happened. Mr Martin placed his body in front of the digger in order to prevent its operations. Mr Barre told the police officers that he had a right of way and was entitled to maintain the Way. Mr Martin told the police that he was objecting to the work “because Mr Barre could not produce proof he was insured/qualified to do the work”; according to Mr Martin, the insurance document that Mr Barre produced was only for household insurance and did not extend to work on a third party’s land. The police officers did not consider that any criminal offence had been committed and they declined to become involved in what they regarded as a civil dispute. It was recorded that Mr Barre and Mr Martin had agreed that work would stop that day so that Mr Barre could produce evidence of insurance on a later date. The claimants have made no further attempt to carry out works on the Way.
47. In November 2013 an incident, not involving the Way, led to an altercation between Mr Barre and Mr Martin, in consequence of which on 27 June 2014 Mr Martin was convicted at the Welshpool Magistrates’ Court of common assault. These events served only to exacerbate the antagonism between the parties.
48. In May 2014 Mr and Mrs Martin wrote to the claimants’ solicitors:

“We do not give permission for your clients (or anyone appointed by them) to carry out any works on our land. we do not agree that the roadway is ‘virtually impassable’. The

roadway is suitable for agricultural access being the standard required by the easement—although parts of the roadway are maintained to a significantly higher standard at our cost.”

49. In June 2014 Mr Martin removed the 4.8m (16-foot) gate near the entrance of the Way and installed in its place a 3.1m (10-foot) gate. The original gateposts were left in place and new ones were attached to them for the new gate.
50. On 12 August 2014 the claimants’ solicitors wrote to Mr and Mrs Martin, requiring that certain matters be addressed within seven days:
- “1. As previously requested, and as can be plainly seen by any objective third party, the surface of our clients’ right of way is in an extremely poor state of repair. This needs addressing and your agreement to any of our clients['] previously suggested options needs to be received within the above deadline.
  2. Over a period of time the width of the right of way has been restricted and although our client could previously still access with large vehicles (by carefully avoiding the boulders placed by you) the reduction in the width of the gate cannot be circumvented. The original sized gate therefore needs to be reinstated within the above timeframe.”
51. Mr and Mrs Martin replied on 19 August 2014. As to maintenance, they said that the track was maintained to the specified standard, namely that suitable for agricultural access, and that some of it was indeed maintained to a higher standard at their expense. As to the width of the Way, they said:

“You state that the gateway width restricts your client’s access. You accept that the remainder of the access is not restricted in any way. The gateway has a clear opening of ten feet. The stone markers delineating the right of way (which you describe as ‘boulders’ and which have been in situ without complaint for many years) are also approximately ten feet apart. Furthermore, Mr Barre installed a concrete twin track surface along the length of the old lane [that is, the part of The Gro’s access beyond the end of the Way, including land owned by the Beauclerks]. He did the work himself. The track that Mr Barre installed measures up to eight feet six inches in width. That being the case, the access that your client installed is narrower than at any point of the access track on our land, including the gateway. The widest vehicle your client owns is a JCB which, when measured at the widest point, is under eight feet. Your clients continue to use the right of way on a daily basis.”

The letter proposed a meeting, without prejudice, to explore possible resolution of the dispute. That proposal did not find favour with the claimants.

52. In the autumn of 2015 the defendants constructed a new wall on the east side towards the southern end of the Way, in a position opposite tennis courts on the west side. They also placed boulders on either side of that stretch of the stone track. The claimants complain that the effect of these works has been to make it difficult for larger vehicles to turn onto the concrete part of the access to The Gro, beyond the end of the Way: the Way has been narrowed; the alignment of the Way has been moved towards the west (the right, as one approaches The Gro), making the right bend onto the concrete part of the access more acute; and the boulders on the east restricts any ability to manoeuvre on the bend. Mrs Barre states: “Should we decide to sell The Gro any prospective purchaser would not be able to get a removal wagon around the bend.” Her evidence, by way of example, was that on 20 December 2017 an oil tanker was unable to gain access to The Gro over the Way, and the claimants’ supply of fuel for the Christmas period had to be brought subsequently with a smaller vehicle.
53. In the spring and early summer of 2017 Mr Martin narrowed the eastern side of the splay at the entrance to the Way. He cut out a section of concrete from the splay, placed soil down and seeded it with grass, and sectioned the area off with bollards to the north and boulders to the west. Thereafter he put up a trip-rail fence. (The effect of the works is seen by comparing photographs G, H and I in Appendix 2 to the report of the claimants’ expert, Mr Wyn Jones, with photographs 1 and 2 in Appendix 1 to that report.)
54. In July 2017 Mr Martin dug a trench across the Way, a few feet beyond the gate at the entrance, in order to run a temporary water pipe under the Way. The trench was backfilled. A few days later, in poor weather, it collapsed under the weight of a car belonging to a visitor to The Gro, causing the car to become stuck. I doubt whether this result was positively intended by Mr Martin; however, it is very probable that he would have taken greater care with regard to the works if they had involved a road or track over which he was exercising access. On 24 July Mrs Martin told the claimants by email that it was hoped to carry out remedial works that week, and she proposed a meeting to seek to find “a constructive way forward”. The claimants responded to the effect that they preferred to communicate in writing. On 31 August 2017 Mr Martin sent them an email:
- “Further to my recent emails requesting a meeting and your wish to have matters in writing.
- With immediate effect, you no longer have our permission to put your rubbish and recycling for collection on our land. any rubbish and recycling put on our land will be removed and brought back to the Gro entrance for you to dispose of properly.
- For the avoidance of doubt, we own the land to the edge of the highway on both sides of our entrance.”
55. On 14 December 2017 Irwin Mitchell (“IM”), solicitors representing the claimants, wrote a pre-claim letter to Mr and Mrs Martin. The letter raised three particular matters: first, the condition of the surface of the Way and the preventing of the claimants from carrying out maintenance; second, the installation of a gate and its replacement with a narrower gate; third, the placement of boulders on the access

splay. The action it required of Mr and Mrs Martin included the following: removal of the gate; removal of the boulders from the access splay and from along the side of the Way; reinstatement of the tarmac removed from the access splay; and repair of the surface of the Way.

56. The pre-claim letter said that the new access that had been constructed in 2009 “did not affect [the claimants’] rights over the driveway pursuant to the Deed of Grant dated 1 December 1993”. Mr Martin has taken that to mean that the works to construct the access and the access itself had not interfered with the Way. However, I take it to mean no more than that the claimants’ rights in respect of the Way were unaffected by the creation of the new access in 2009.
57. On 2 May 2018 a surveyor instructed by the claimants to inspect and survey the Way was asked to leave by Mr Martin. Mr Martin says that he was standing with surveying equipment on land outside the scope of the Way. The survey was completed with Mr Martin’s permission in late June 2018. Meanwhile, Mr Martin carried out some works to the surface of the Way; he said this about them in a letter to IM on 21 June 2018:

“You should be aware from your clients that we have recently taken steps to level out the track. For the reasons set out in our previous letter we do not accept that your clients have the right to do maintenance work, nor do we have an obligation to do any such. However, in order to prevent further deterioration, and as a goodwill gesture, without any admission of any sort, we have levelled out the worst of the potholes. This should be more than enough to prevent there having to be any claim of any sort, however unfounded, to seek any sort of order for repairs.”

58. The letter of 21 June 2018 also included an offer of a licence for the claimants and their visitors to use the main entrance from the A495 (that is, the new access that had been constructed in 2009). The offer did not require that the claimants surrender their easement over the Way. It is unnecessary for me to consider the merits of that offer now. It suffices to say that no response was made to Mr Martin’s letter.
59. Indeed, IM did not write again until 20 May 2019, when they set out a detailed case. The following passages give the tenor of the letter and the gist of the case now advanced:

“Contrary to your previous assertions the use of the New Roadway is not restricted to either use as an agricultural access or for use only by insured vehicles.

...

In our opinion it is highly likely that a Court would conclude that the gates, the obstacles places (sic) along the New Roadway, the obstacles placed at the spay of the New Roadway onto the public highway together with the contention that the New Roadway should be restricted to use as an agricultural

access and only by insured vehicles all constitute actionable interferences with our clients (sic) right of way over the New Roadway in respect of which we also consider it highly likely that a court would be willing to grant our clients injunctions to remove or substantially alleviate those actionable interferences with their right of way.”

“For the avoidance of doubt our clients accept that the Deed dated 1 December 1993 imposes no obligation on you as registered owners of the land on which the New Roadway is situated to maintain or repair the New Roadway.

However, notwithstanding the absence of any such positive obligation on your part to keep the New Roadway in repair, our clients are entitled to exercise their own rights to repair the New Roadway at their own expense. When land enjoys a right of way over other land, it also enjoys ancillary rights to do such things as are ‘reasonably necessary to its exercise and enjoyment’.

This includes a right to enter onto the servient land to undertake works of repair and maintenance to the land encumbered by the right of way. The right includes a right to do necessary work in a reasonable manner and also includes the right to make improvements if desired for a purpose not in contemplation at the time of the grant.”

60. The letter was specific in its demands: the gate was to be removed, as were the “obstacles” at the splay; the splay was to be reinstated as it had been in 1993; the stone wall adjacent to the highway was to be removed; the trip rail near the wall and the chain link fence and boulders were to be removed; the width of the drive was to be increased and a proper gravel surface was to be provided. Under cover of the letter, IM provided a copy of the expert report dated 2 August 2018, which I shall mention more fully below.
61. Mr and Mrs Martin responded on 28 May 2019. They said that the Way had not been restricted since 1992 and that it was in a proper state of maintenance and repair. They repeated the offer that they had made a year previously and noted that they had not received any response to it.
62. IM did not reply to Mr and Mrs Martin until 20 November 2019, when they wrote to say that they had instructions to commence proceedings.

### **The Issues**

63. There are two main issues in the case. The first issue concerns the physical extent of the Way over which the claimants have a right of way. This issue is fundamental to the question whether the defendants have interfered with the exercise of the right of

way; they contend that they have done nothing more than confine the claimants to the limits of the right of way granted to them by the Deed of Release.

64. The second issue concerns the right of the claimants to maintain and repair the Way. When he gave evidence, Mr Martin was cagey to the point of evasiveness regarding his acceptance or denial that the claimants had any such right. However, the correspondence to which I have referred makes clear that the defendants have been unwilling to accept that any such right exists.
65. Central to these issues is the proper construction of the Deed of Release.

### **Construction of the Deed of Release**

66. The construction of a deed, whether one granting a right of way or performing some other function, is subject to the same principles as those that apply to other contracts. Those principles are not in doubt. They were summarised concisely by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

“The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.”

67. The ramifications of that approach have been discussed in detail in many recent cases. A helpful summation of the main points was provided, in the context of commercial contracts, by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [17]-[19]:

“17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:

- (i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the



overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

(ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

(iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

(iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

(v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should

avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

(vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.

68. In the context of the present case, a couple of further points may be noted.

- 1) The intention of the parties to the Deed of Release is to be ascertained by the reference to the deed as a whole. This includes the plans referred to in the deed. In the present case, Plan 2 is not subordinated to any verbal description of the Way; the New Roadway is simply defined as “the roadway shown coloured yellow on the Plan 2”. The use of the plan is nevertheless subject to the usual principles of construction. “Physical features may be taken into account even where the conveyance states that the land conveyed is ‘defined’ by a plan”: Lewison, *The Interpretation of Contracts*, 7<sup>th</sup> edition, para 11.39.
- 2) The sixth general principle stated by Carr LJ requires some modification in the context of conveyances of land or other deeds that grant or reserve rights over land. Where the extent of the land—in a case such as this, the way over which rights of access are granted—is unclear from the conveyance, conduct subsequent to the deed is in principle admissible as an aid to construction, provided that it is of probative value in ascertaining the intentions of the parties to the deed. See *Ali v Lane* [2006] EWCA Civ 1532, *per* Carnwath LJ at [21]-[38]. The proviso is important, however.

### **The Extent of the Way**

69. The narrative above sets out significant events relied on by the claimants. Mrs Barre’s evidence was that the Way has been significantly narrowed and restricted in several respects since 1999. First, where the gate is now the total available width was

7 metres (23 feet). The stone track itself was wider than it is now, and the verges were also in use. Second, the placing of boulders on the verges has narrowed the usable extent of the Way, in particular at two bends: the bend to the left just past the gates, and the bend to the right at the end of the Way, where it joins the concrete track to The Gro. Third, the bend in the Way where it turns to the south, at the point where the entrance to Bryn Tanat is ahead to the east, has been narrowed. Fourth, the entrance splay has been narrowed by the erection of the trip-rail fence and by the grassing over of part of the eastern side of the splay.

70. I was assisted by expert evidence concerning the extent of the Way. Evidence for the claimants was given by Mr T. Wyn Jones, a chartered surveyor, of McCartneys' Ludlow office, whose relevant report was dated 2 August 2018. Evidence for the defendants was given by Mr Stuart Richards, chartered surveyor, at Halls of Shrewsbury, whose report was dated 14 January 2021. Both experts made use of their own land surveys of the site—which, happily, produced similar results—and both used the results of their surveys in conjunction with analysis of historic ground and aerial photographs, Ordnance Survey maps and, of course, Plan 2 to the Deed of Release. I have considered carefully the evidence given by the experts in their written reports and orally at trial. However, I do not propose to recite it. Instead, in the light of the factual and expert evidence and the plans and photographs, I shall state and explain my conclusions on matters of substance.
71. First, Plan 2 was drawn to scale, as indeed it purports to have been. It is not possible to use existing copies of the draftsman's original to produce dimensions by way of an absolute scale. However, it is possible to use Plan 2 for purposes of relative scale, in the sense that it can be enlarged or reduced for the purpose of overlaying it upon other plans or aerial photographs, by reference to fixed features, and it is accurate as to the positions of those fixed features.
72. Second, although the other fixed features on Plan 2 correlate to those produced by the experts' survey plans, the exact position of the Way does not correlate to what is there now or to what is shown on any of the aerial photographs. The discrepancy is not great but it is significant, such that any attempt to make the physical way correspond with what is shown on Plan 2 would require it to be reconfigured in such a manner as to differ from what can ever have been present. It is a reasonable inference that Plan 2 does not show the Way by reference to a survey of its actual position.
73. Third, I accept Mr Martin's evidence that he carved out the track without reference to or assistance from Plan 2. The entrance from the highway was marked out by highways officers of the county council and the line of the track thereafter largely took care of itself, because it had to swing round to the east in order to connect to the direct approach, on an east-west axis, to the entrance to Bryn Tanat.
74. Fourth, as it is not known by what processes Plan 2 was prepared or to what extent its preparation was cumulative, it is impossible to be sure whether Plan 2 was drawn after or before the stone wall had been erected on the south and east of the Way (that is, the approach to the entrance to Bryn Tanat) and the fence had been erected on the other side of the Way. However, those features are shown on Plan 2, whether in anticipation of what was to come or by depiction of what was there. I find that the wall and the fence were present when the Deed of Release was executed.

75. Fifth, in these circumstances, the Deed of Release is properly to be construed by reading Plan 2 alongside and in the light of the physical features that existed in December 1993. Specifically, the New Roadway was an existing physical feature, and it is to that feature that Plan 2 was referring.
76. Sixth, as regards the entrance splay, a photograph from 2009, which shows the state of affairs at the entrance as it would have been since the creation of the Way except for the 16-foot gate, shows on the east the junction of the hedge and the former curved stone wall and the metalled surface extending to within inches of the wall, with the splay continuing to the east beyond the hedge. The same photograph shows the fence on the west but not its junction with the hedge; there was a wide grass verge between the metalled surface and the fence. Observation at the site confirms that the splay is now significantly less wide, at least on the eastern side. Further confirmation is provided by two pieces of evidence in Mr Richards' report, namely (1) an overlay of his site survey drawing over a 1999 aerial photograph that shows the land substantially as it would have been at the time of the Deed of Release and (2) an overlay of Plan 2 over the site survey drawing. Both of these overlays illustrate a narrowing of the funnel-shaped splay into something approximating more to a straight access from the highway. This gives credence to Mrs Barre's evidence that the entrance into the Way from the east (that is, as a left turn) is now more difficult than it used to be, at least for long vehicles, and that it used to be but is not now possible for two vehicles to pass in the mouth of the Way.
77. Seventh, Plan 2 shows the width of the Way as extending the full width from the fence on one side to the wall on the other side. It does not exclude verges from the Way. In my judgment, on a proper construction of the Deed of Release, having regard to Plan 2 and to the physical features on the ground at the time, the right of way was in respect of the entirety of the land between the wall and the fence. This was, I think, a matter of some importance. The Old Roadway, over which rights were released by the Deed of Release, was more or less straight along its length. The Way, by contrast, is not straight, and a vehicle of any length would be likely to experience some difficulty in keeping within the confines of a track as narrow as the northern end of the Way now is. Plan 2 shows the New Roadway as significantly wider than the Old Roadway, and I think that was probably intentional. Further, as three different properties were originally to use the Way—Bryn Tanat, The Gro, and the Beauclerks' tenanted land—it was important that vehicles could pass.
78. Eighth, there has clearly been a narrowing of the Way in its northern part.
  - a) Mrs Barre's evidence was that, before the gate was put up, two vehicles could pass at that point. She said that the width of the Way there was about 23 feet. I accept this evidence, albeit that I make no finding as to the precise measurement. Mrs Barre struck me as an honest witness, and I was not persuaded that any substantive evidence indicated the contrary. She says that vehicles could and did pass at that point and I see no reason to doubt that this is so. Further, both aerial photography from 2008 and ground photography from an unspecified but probably similar date show that the width where the gate now is was probably not very much different from Mrs Barre's estimate, albeit that the stone surface was narrower.

- b) The boulders along the edge of the stone surface of the Way are in my judgment an encroachment onto the Way as shown the Deed of Release, regardless of whether (as Mrs Barre contends) the stone surface has narrowed. This is a significant matter, because it means that verges cannot be used for passing as was once possible and because vehicles are unable to swing over the line of the stone track.
  - c) The width of the Way from the entrance off the highway to the right bend at the entrance to Bryn Tanat has noticeably reduced, as an overlay comparison of the 1999 aerial photograph and Mr Richards' survey shows. Mr Hoffman warned me about the dangers of drawing such inferences from aerial photographs, when information was not available as to distances and angles. The warning is duly noted, but my interpretation of the photograph is unaffected.
  - d) Where the Way approaches the bend to the south and, directly ahead, the entrance into Bryn Tanat, there is encroachment onto the Way by structures for bin storage erected by the defendants in conjunction with the making of their new access. This is conveniently shown by the overlay of Mr Richards' survey over the 1999 aerial photograph.
79. Ninth, there is some minor narrowing at points along the southern end of the Way, where in 1993 there was no wall on either side but only fences. I am not persuaded that there has been any significant realignment or encroachment, however, save that the presence of boulders adjacent to the stone surface does in my view unlawfully prevent recourse to the verges when necessary. (The position would be different if Plan 2 were read without reference to the features actually existing on the ground when the Deed of Release was made. As the overlays carried out by the experts demonstrate, a literal reading of Plan 2 in the abstract would indicate the need for substantial reconfiguration at both the northern and southern ends of the Way. But the Way has never been so configured.)
80. I make two further observations. The first observation concerns the fact, pointed out by Mr Richards, that the width of the Way was at all points greater than the width of what he called "pinch points" on the concrete track that leads from the Way to The Gro over land still owned by the Beauclerks. One of those pinch points is the width (2.4 metres, about 9 feet) between the hedges on either side of the track. Another is a point, further along the track, where the width between a telegraph pole and the hedge is 3.1 metres (about 10 feet). The points are well made. However, the pinch points on other access, beyond the Way, do not mean that narrowing of the Way is either permissible or a matter of no importance. The ability to pass other vehicles at the entrance and along the Way is important, as is the ability of larger vehicles to negotiate bends. I do not accept a submission made by Mr Hughes, to the effect that it was advantageous to be able to get as near as possible to The Gro: if this is meant to suggest that it would be advantageous for vehicles to go to the end of the Way even if they could proceed no further, it appears to envisage that they would then stop on the Way; and for this there is, in my view, no right. However, I do consider that physical limitations beyond the end of a way are not themselves a justification for narrowing a way. For example, if A has a right over a 20-foot track over B's land, I cannot see that B is entitled to reduce the width of the track to 10 feet just because, at the end of the track, A's onward journey to A's land must be over a 10-foot track over C's land.

81. The second observation concerns a small area of land (“No-Man’s Land”) immediately to the south-east of the southern end of the Way; that is, as one approaches The Gro, slightly ahead and to the left of the place at which the Way ends and the access continues on land owned by the Beauclerks. There is a relatively tight right-hand bend at this point. Mrs Barre’s evidence was to the effect that larger vehicles would in the past make use of No-Man’s Land to facilitate negotiating the bend or indeed for turning. However, Mr Martin has placed boulders on No-Man’s Land, so that it cannot be used in this way anymore. The evidence does not show, at least to my satisfaction, who owns No-Man’s Land: it might be (I think, probably is) the Beauclerks, but it might be the defendants. At all events, No-Man’s Land does not form part of the Way and is not an issue in this claim. It may be that Mr Martin’s conduct in placing boulders on No-Man’s Land is petty and mean-spirited, but it does not fall within the proper scope of these proceedings.

### **Rights of maintenance and repair**

82. The law may conveniently be taken from the statement in *Gale on the Law of Easements*, 21<sup>st</sup> edition (footnotes and citations omitted):

“9-112 The dominant owner is entitled to enter the servient land to effect repairs or to alter the surface of the servient land to accommodate the right granted. So a dominant owner may be entitled to enter the servient land to install lighting if that is reasonably necessary to enable the way to be used safely and conveniently.

9-113 The following summary of the law has been described as ‘settled for centuries’ and uncontroversial. Subject to contrary agreement,

(1) the grantee may enter the grantor’s land for the purpose of making the grant of the right of way effective viz. to construct a way which is suitable for the right granted to him;

(2) once the way exists, the servient owner is under no obligation to maintain or repair it;

(3) similarly, the dominant owner has no obligation to maintain or repair the way;

(4) the servient owner (who owns the land over which the way passes) can maintain and repair the way, if he chooses;

(5) the dominant owner (in whose interest it is that the way be kept in good repair) is entitled to maintain and repair the way and, if he wants the way to be kept in repair, must himself bear the cost;

(6) he has a right to enter the servient owner's land for the purpose but only to do necessary work in a reasonable manner.”

83. The simple position would therefore appear to be that the claimants, though under no obligation to maintain the Way, are entitled to carry out upon the Way necessary works of maintenance and repair, for the purpose of putting or keeping the Way in a satisfactory condition for their permitted user of it, provided that they carry out the works in a reasonable manner.
84. However, the defendants advanced an argument containing the following elements. (1) Clause 5 of the Deed of Release imposes a specific repairing obligation on the servient owner. (2) The dominant owner's supposed ancillary right of repair would be unnecessary in the light of the express obligation and inconsistent with it; therefore there is no such right. (3) Clause 6 defines the required standard of maintenance and repair as being maintenance and repair to a condition “suitable for agricultural use only”. (4) Therefore, provided the Way is maintained to a standard that is suitable for agricultural use, the claimants cannot complain that it is not maintained to a better standard and have no right of recourse.
85. That argument is, in my judgment, wrong in just about every respect, for the following reasons.
- 1) It does not require detailed analysis of the Deed of Release to see that the argument cannot be right. The right of way granted by clause 4 is exercisable at all times, on foot and with or without animals and motor vehicles, and “for all purposes connected with the use and enjoyment of the Dominant Land”. The defendants' argument would mean that, if the Way were maintained to a standard that was suitable for agricultural use but not for any other kind of use, the dominant owners would be unable either to complain about disrepair or to take remedial action themselves. Thus the breadth of the grant would be illusory.
  - 2) Clause 5 is a covenant by the Company to maintain the Way in good repair and condition. The covenant, as a positive covenant, does not run with the land and does not bind the Company's successors in title. Therefore the premise that there exists a positive repairing obligation on the servient owners is incorrect.
  - 3) It is also incorrect to say that clause 6 defined the standard of repair required by the covenant in clause 5. The requisite standard of repair was stated in clause 5 itself: “good repair and condition”. The meaning of that standard was a matter of context; the user permitted by clause 4 gave content to the meaning of “good repair and condition” and precluded any suggestion that the Way was properly repaired and maintained provided it were suitable for some limited form of use.
  - 4) The reference to “a roadway suitable for agricultural access only” in clause 6 has quite a different function. It does not qualify the repairing covenant in clause 5 but simply specifies the extent of the dominant owner's obligation to contribute to maintenance costs in accordance with the proviso in clause 5 and

the covenant to contribute in clause 6. This makes perfectly good sense, because the Way was to be used as a common access by the dominant and the servient owners; the dominant owners might well be content with a more basic form of track (such as one covered in compacted stone, with no drainage: the form of track that was in fact constructed), while the servient owner might wish to upgrade the road to a higher standard. The concluding words of clause 6 prevent the servient owner from imposing a charge on the dominant owner in respect of works that the latter does not want. (Indeed, there is indirect evidence that this is precisely how clause 6 originated. Correspondence shows that the Beauclerks, who were also dominant owners in respect of the right of way granted to them by a separate deed, required that the obligation to contribute be limited in just this manner and for this reason. Although the rights of way were dealt with by separate deeds and the wording of the relevant provisions in the two deeds was not identical, the correspondence provides a graphic illustration of the logic of clause 6.)

86. Mrs Barre's evidence was that the Way is currently in a satisfactory state of repair. However, on the basis of the photographs and Mrs Barre's evidence I am satisfied that there have been periods in the past when the Way has been badly out of repair and that this has caused inconvenience to the claimants and, as Mrs Barre confirms, some damage to their vehicles. Its present state of repair is due solely to Mr Martin's decision, without admission of any sort, to carry out maintenance works after the initial inspection by Mr Wyn Jones in May 2018.
87. Mr Martin's evidence was to the effect that the Way had always been maintained to a satisfactory condition and that he had not sought to make its use unattractive to occupiers of and visitors to The Gro. I do not accept that evidence. There is interesting evidence that, in my view, shows quite clearly Mr Martin's mentality. At the entrance to the Way, by the gate, he has put up a sign stating: "Access maintained to agricultural standard only". Unsurprisingly, he has not put up a sign at the entrance to his own access way, explaining to what standard that route is maintained. The sign on the Way is not an interesting though irrelevant piece of information for visitors. It is a recognition that the standard of the Way may not be suitable for visitors and that they use it at their own risk.

## **Relief**

88. The relief sought in the particulars of claim is broadly as follows:
- An injunction requiring the defendants to remove from the Way all obstructions to the use of the right of way;
  - An injunction prohibiting the defendants from interfering with the use of the right of way;
  - An injunction prohibiting the defendants from interfering with the claimants' exercise of their right to maintain and repair the Way;
  - General damages for inconvenience;



- Aggravated damages on the grounds that the defendants' conduct has been motivated by the improper purpose of deliberately seeking the abandonment of the use of the right of way.
89. In his closing submissions, Mr Hughes invited me to consider also making appropriate declarations and disarmingly acknowledged that the state of the evidence did not make the court's task easy in formulating the terms of relief.
90. It does seem to me that it would be convenient to make declarations as to the two basic issues, namely the extent of the Way and the claimants' right of repair. I shall invite counsel to seek to agree and then to propose terms of an appropriate declaration on each point, in accordance with the following observations.
91. Concerning the extent of the Way (which, in accordance with the terms of the Deed of Release, I shall now call the New Roadway), I do not think it possible to make a declaration that identifies lines or dimensions. Rather, it seems to me that the appropriate declaration is to the effect that the location and extent of the New Roadway identified in the Deed of Release, as shown coloured yellow on Plan 2 thereto, and over which the right of way thereby granted exists are the location and extent of the access way then existing, including both the hard track and the verges to the full extent of the width between walls and fences then existing on either side.
92. Concerning rights of maintenance and repair, I consider that two simple declarations ought to address the issues that have specifically arisen before me, to the following effect: (1) that no obligation of maintenance and repair rests on either the dominant owners or the servient owners; (2) that the dominant owners and the servient owners each have a right to maintain and repair the New Roadway in accordance with the common law so that its condition is fit for any and all user lawfully permitted.
93. As for injunctions, Mr Hoffman submitted that no such remedy ought to be granted, because of the delay on the part of the claimants. I do not accept that submission. As Mr Hughes observed, it seeks to achieve abandonment by the claimants through the back door. Further, I accept Mrs Barre's evidence that she and her husband sought to avoid litigation because of the expense and uncertainty it would involve and only brought proceedings when they felt that enough was enough; this is understandable. On the other hand, I do not think that the delay can be ignored, because it creates difficulty in formulating the terms of remedies (some details are simply lost in the mists of time) and because it might provide some indication of the significance or otherwise of encroachments on the New Roadway. Some injunctions are, in my view, appropriate, but they must be formulated with sufficient precision to enable the defendants and everyone else to know what is required or prohibited. Again, I shall invite counsel to consider the terms, in accordance with the following remarks.
94. I shall grant an injunction in respect of the entrance splay. It does not seem to me to be possible to require with sufficient precision that all the changes of the last twenty-seven years—in particular, those occasioned in late 2010—be reversed. Nor is that necessary. The real problem arises from the works carried out by Mr Martin in about April 2017, with the removal of the section of concrete from the east side of the splay and the placing of the low fence and boulders on the newly grassed area. Having seen the locus and considered the evidence, I am satisfied that those works made it significantly more difficult for vehicles, especially large vehicles, approaching from

the east to turn left into the New Roadway. I am also satisfied that this result was Mr Martin's deliberate intention. An injunction will be granted to require the defendants to remove the grass, fence and boulders from the area that was formerly the splay and to reinstate the splay at that point. It ought not to be difficult to identify precisely what needs to be done in that regard.

95. I shall grant an injunction for the removal of the gate and posts. In the light of other relief that I shall grant, it might be said that the gate is not a significant obstruction, because it is wide enough for any one vehicle to pass through and because, if two vehicles meet, one can wait while the other passes. However, where any two vehicles could once have passed each other with ease at that point, this is no longer possible. That is in my judgment a significant obstruction of the New Roadway. I repeat that I am satisfied that the installation of the gates, first the 16-foot gate and then the 10-foot gate, was a deliberate attempt to inconvenience the claimants; it had nothing to do with security.
96. I shall grant an injunction for the removal of boulders from the verges along the New Roadway.
97. However, I shall not grant an injunction for any reconfiguration of the New Roadway. The evidence does not permit any conclusion that this or that feature ought to be moved or removed. Particular mention may be made of the bin store, which is near the point at which the New Roadway provides access to Bryn Tanat and turns southwards towards The Gro. This structure does indeed encroach onto the New Roadway. However, it has been present for many years; the claimants did nothing to seek to prevent its construction; and the evidence leads me to the conclusion that it makes only a limited difference to the exercise of the right of way, because vehicles are still able to manoeuvre around the bend and (at least with the other relief I shall grant) they may sufficiently pass each other. In the circumstances, I shall not make an award of equitable damages in lieu of an injunction in respect of the bin store.
98. As noted above, the claimants' claim for damages has two parts: first, a claim for general damages for inconvenience; second, a claim for aggravated damages on the grounds of the defendants' improper motivation. Aggravated damages are a form of compensatory damages: they compensate claimants for their injured feelings and mental distress that are due to the manner in which the defendant committed the tort, for example when it demeaned or humiliated the claimant (cf. *Gale on the Law of Easements*, paras 14-165 – 14-167). Such damages are not punitive and are different from exemplary damages. In the present case, Mr Martin has done his best to "encourage" the claimants to give up the use of the New Roadway; I have made my view of his behaviour clear enough already. But there is no plea that the manner in which he has interfered with the claimants' rights has caused them injured feelings or mental distress, and there is no evidence that would have supported such a plea. No claim has been made for exemplary damages, and I do not say that such a claim would have had merit.
99. Therefore the issue concerns the claim for general damages for inconvenience. Mr Hoffman submitted that any inconvenience had been brought by the claimants upon themselves by a refusal to accept reasonable offers of alternative and better access. I reject that submission. Perhaps the claimants would have been sensible to accept those offers. Perhaps not. They are entitled to make their own choice in that matter

and to rest content with the rights they have. Delay, however, is a factor. The defendants have not pleaded reliance on the 6-year limitation period applicable to claims for damages for tort. Therefore the claimants are not strictly limited to damages in respect of inconvenience suffered during the period since 5 January 2014, six years before the issue of the claim form. Nevertheless, the claimants' delay in bringing proceedings is some indication that the inconvenience that they have actually suffered, as distinct from their concern for what might be occasioned hereafter, is modest. The main inconvenience suffered by the claimants themselves has, I think, related principally to the condition of the New Roadway, which has at times been very poor.

100. The award of general damages will be £1,000.
101. Interest on those damages is in the discretion of the court. I shall award interest on the damages at 2% per annum from 5 January 2014 until the date of judgment.
102. Matters concerning the terms of the order, costs and any application for permission to appeal will be adjourned for consideration at a hearing by Microsoft Teams or Cloud Video Platform.